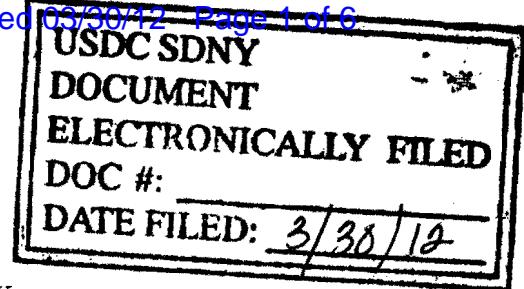


UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



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NORMAN RUND, : 10 Civ. 5284 (LAP)
: Plaintiff, :
: : MEMORANDUM AND ORDER
v. :
: JPMORGAN CHASE GROUP LONG TERM :
DISABILITY PLAN and HARTFORD LIFE & :
ACCIDENT INSURANCE COMPANY, :
: Defendants. :
-----X

LORETTA A. PRESKA, Chief United States District Judge:

Defendants JPMorgan Chase Group Long Term Disability Plan and Hartford Life & Accident Insurance Company ("Hartford" or "Defendants") bring this motion to strike Plaintiff Norman Rund's ("Plaintiff" or "Rund") Affidavit (the "Rund Affidavit") and portions of Paul M. Kampfer, Esq.'s Affirmation ("Kampfer Affirmation") in support of his motion for summary judgment. For the reasons set forth below, Defendants' motion to strike [dkt. no. 36] is GRANTED.

Both parties have acknowledged that Plaintiff's Affidavit is not part of the administrative record that was before the claims administrator when the decision was made to discontinue Plaintiff's long term disability benefits. (See Defendants' Memorandum of Law in Support of Motion to Strike ("Def. Mem.") at 1; Plaintiff's Memorandum of Law in Opposition to Defendants'

Motion to Strike ("Opp.") at 2.) Defendants wish to strike Paragraph 5 and Exhibit "B" of the Kampfer Affirmation which was submitted in support of Plaintiff's motion for summary judgment.

I. Standard of Review

"Because a decision on the motion to strike may affect [the movant's] ability to prevail on summary judgment, it is appropriate to consider the Motion to Strike prior to [the parties' motions for partial] summary judgment." Century Pacific, Inc. v. Hilton Hotels Corp., 528 F. Supp. 2d 206, 213 (S.D.N.Y. 2007) (internal quotation marks omitted). Rule 56(c) (4) of the Federal Rules of Civil Procedure requires that "[a]n affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c) (4). It is therefore the rule that "only admissible evidence" need be considered on summary judgment. Rankin v. Wyatt Co., 125 F.3d 55, 66 (2d Cir. 1997). "The principles governing admissibility of evidence do not change on a motion for summary judgment." Id.

When a court reviews an administrator's discretionary decision determining eligibility for benefits under a discretionary standard of review, the court may not consider evidence outside of the administrative record. Miller v. United

Welfare Fund, 72 F.3d 1066, 1071 (2d Cir. 1995). The administrative record consists of the documents before the claims administrator when the decision regarding benefits was made. See Krizek v. Cigna Group Ins., 345 F.3d 91, 97 (2d Cir. 2003). Thus, the Court here may not consider evidence outside the administrative record.

II. Analysis

A. Rund Affidavit

Plaintiff contends that the facts stated in the Rund Affidavit are either drawn from the administrative record, admitted, or taken for granted by the Defendants, (see Opp. at 2), and are therefore not "outside the administrative record." See Krizek, 345 F.3d at 97.

Plaintiff's affidavit was not part of the administrative record before the claims administrator when the decision was made and is therefore inadmissible. The plaintiff himself admits that this Court cannot consider evidence outside the record used to make the benefit determination. (See Opp. at 1.) It is irrelevant that the affidavit may be composed primarily of information drawn from the administrative record. The crucial fact is that the affidavit itself was not reviewed by the administrator who denied the plaintiff further benefits. The Court of Appeals has made clear that "district courts may consider only the evidence that the fiduciaries themselves

considered." Miller, 72 F.3d at 1071. Therefore, the Court finds it proper to strike Rund's Affidavit.

B. Portions of Kampfer Affirmation

In his motion for summary judgment, Rund refers to Exhibit "B" to Kampfer's Affirmation, which is the Chase Guide to Benefits. The document was never properly authenticated and is not part of the administrative record. Plaintiff does not argue that the Guide to Benefits should be considered by the Court because of any issues with Hartford's LTD Plan. Although Plaintiff cites to Allison v. Unum Life Ins. Co., No. 04 Civ. 0025, 2005 WL 1457636, at *10 (E.D.N.Y. Feb. 11, 2005), in support of the proposition that certain extra-record material is admissible in certain situations, (see Opp. at 4), Plaintiff has not demonstrated the applicability in this case. In Allison, the opposing parties did not agree on what comprised the administrative record, and Plaintiff requested that the court consider extra-record material. Allison, 2005 WL 1457636, at *9. The District Court for the Eastern District of New York, using a de novo standard of review, could consider limited evidence outside of the administrative record. Id. at *10. Here, the Court is reviewing the motions under a deferential standard of review, but moreover, there is no dispute as to what constituted the administrative record. It is inappropriate for

the Court to consider paragraph 5 and Exhibit "B" of the Kampfer Affirmation.

C. Rund's Cross-Motion to Strike

Plaintiff urges the court to strike the Declarations of Bruce Luddy and Donna Gatling submitted in support of Defendants' motion for summary judgment.¹ The principles guiding the admissibility of evidence do not change when a party has moved for summary judgment. Raskin v. Wyatt Co., 125 F.3d 55, 66 (2d Cir. 1997). As noted above, the Federal Rules require that any declaration submitted to "support or oppose a motion must . . . set out facts that would be admissible in evidence." Fed. R. Civ. P. 56(c)(4). Plaintiff did not properly move to strike the Luddy and Gatling Declarations, but, even if he had, those Declarations were properly submitted in support of Defendants' motion for summary judgment and are admissible evidence. Accordingly, Plaintiff's request to strike the Luddy and Gatling Declarations is denied.

¹ It is questionable whether the Plaintiff has formally and properly made a motion to strike these declarations. Plaintiff briefly and generally asks in his Opposition that if the court were to strike their supporting affidavit, the same fate must befall Defendants' declarations.

CONCLUSION

For the reasons stated above, Defendants' motion to strike [dkt. no. 36] is GRANTED in its entirety, and Plaintiff's motion to strike is DENIED.

SO ORDERED.

Dated: New York, New York

March 30, 2012



LORETTA A. PRESKA,

CHIEF U.S.D.J.